85-811

No.....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

JOHN L. WILSON and ROBERTA L. WILSON,
Husband and Wife

Petitioners,

vs.

SEARS, ROEBUCK AND CO.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Whether, in a diversity action, a judgment notwithstanding the verdict and order of dismissal based upon an interpretation of state substantive law should be re-examined or reversed when such interpretation has subsequently been rendered invalid by that state's highest court.

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CITATIONS TO THE OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals, No. 84-1314, 757 F.2d 948 (8th Cir. March 20, 1985), appears as Appendix A. The opinion of the United States District Court for Nebraska, No. CV80-0-117, slip opinion, (D.Neb. February 6, 1984), appears as Appendix B. The relevant portion of the opinion and decision of the Supreme Court of Nebraska in *James v. Lieb*, 221 Neb. 47, — N.W.2d — (October 25, 1985), appears as Appendix E.

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JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on March 20, 1985. A Petition for Rehearing was timely filed and the Court of Appeals entered an order on August 14, 1985, denying the Petition for Rehearing, denying the Petitioner's Motion to certify the issue presented in the appeal to the Nebraska Supreme Court, and denying motion for leave to file a brief amicus curiae by the Nebraska Association of Trial Attorneys. This Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

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STATUTES INVOLVED

28 U.S.C. Sec. 1652:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE

Petitioners were patrons in a restaurant in Omaha, Nebraska, on November 26, 1977, when they came to be in or near the line of fire of a person discharging several rounds from a 12-gauge shotgun. Though not struck by any projectiles from the weapon, Petitioner John Wilson experienced a percussion blast and Roberta was hit by flying debris. Each Petitioner suffered extreme emotional disturbance, resulting in a diagnosis of post-traumatic stress disorder, by reason of being placed in fear for their safety.

This diversity action was brought by Petitioners, Nebraska citizens, against Sears Roebuck and Company, Respondent, a Delaware Corporation, alleging that Sears was negligent in selling and entrusting the shotgun to a mentally unstable and dangerous individual. The matter proceeded to trial before a jury, which, on December 14, 1983, rendered a verdict in favor of each Petitioner, $75,000.00 for John L. Wilson and $10,000.00 for Roberta L. Wilson. The verdict was entered by the Clerk on December 21, 1983. On December 23, Respondent filed a Motion for Entry of Judgment notwithstanding the verdict and on February 6, 1984, the Trial Court granted said Motion and dismissed the Complaint of the Petitioners. The Trial Court's ruling was based upon the Court's view that, according to Nebraska substantive law, recovery for negligent infliction of emotional disturbance requires proof of "physical injury," citing *Fournell v. Usher Pest Control*, 208 Neb. 684, 305 N.W.2d 605 (1981) (App. B).

Although Petitioners argued the jury was properly instructed regarding the definition of a "physical injury"

(i.e. a condition or illness susceptible of objective determination), and by its verdict so found, the Trial Court viewed the facts otherwise.

Thereafter, Petitioners perfected their appeal to the Court below on the ground that sufficient evidence of "physical injury" was introduced at trial and that Petitioners' verdict should be reinstated. Further, Petitioners argued that the supposed requirement of "physical injury" in *Fournell* was mere dicta and not a part of the holding of the Nebraska court. In its decision filed March 20, 1985, the Court found that "whether or not the majority's statements regarding the injury issue were an alternate holding or merely dicta, they provided a basis for the district court there to conclude that the State's highest court requires physical injury and that emotional disturbance and distress alone are not sufficient to establish a right to recover. Our function in this diversity case is to determine whether the district court erred in its determination of a state law question. While we entertain the view that the dissenting opinion of *Fournell* is far more persuasive than the majority opinion, it is our duty, as well as the district court's, to follow the court's decision, which is that of a majority of its judges" (App. A).

Petitioners thereafter filed their Motion requesting, in the alternative, a rehearing, or a certification of the issue presented to the Nebraska Supreme Court, which Motion was joined by a Motion for Leave to File a Brief Amicus Curiae of the Nebraska Association of Trial Attorneys. All of said Motions were denied by Order of the Court dated August 14, 1985 (App. D).

Subsequently, however, on October 25, 1985, the Nebraska Supreme Court did in fact render a decision which

clarified the Nebraska State substantive law on the precise issue presented to the Court below by abrogating the "physical injury" requirement for recovery for the negligent infliction of emotional trauma.

This case is now before this Court on the conflict between the lower courts' interpretation of Nebraska substantive law and the actual statement thereof by the highest court of that state.

REASONS FOR GRANTING THE WRIT

The Decision Below Is In Irreconcilable Conflict With A Subsequent Decision Of The State's Highest Court On A Substantive Law Question. This Conflict Constitutes Such A Departure From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

The decision of the Eighth Circuit Court of Appeals in this case is clearly based upon an interpretation of Nebraska substantive law that evidence of physical injury is a necessary prerequisite to recovery for the negligent infliction of emotional distress. It could hardly be argued otherwise. The Court:

> "Whether or not the majority's statements regarding the injury issue were an alternate holding or merely dicta, they provided a basis for the district court to conclude that the state's highest court requires physical injury and that emotional disturbance and distress alone are not sufficient to establish a right to recover. . . . The district court did not err in concluding that *Fournell* disallows recovery for mental and emotional disturbances and stress alone and that this was the

extent of injuries that the Wilsons had proven. The judgment of the district court is affirmed." *Wilson v. Sears*, 757 F.2d 948 (8th Cir. 1985), at pp. 951 and 953.

Further, this decision was in affirmance of that of the Trial Court, whose memorandum also explained this view as the basis for the grant of judgment notwithstanding the verdict and dismissal of the Petitioners' complaint. The Trial Court:

> "Damages for negligent infliction of emotional distress are only recoverable when such distress results in physical injury manifested by objective symptomatology. . . . While the court will concede that the plaintiffs suffered severe emotional disturbance while present at or as an immediate result of the Club 89 shooting, we find that their injuries are not of the type susceptible of objective determination." *Wilson v. Sears*, No. CV80-0-117 (D Neb. 1984), see App. 13 of slip opinion.

It is equally clear that the requirement (of evidence of physical injury) on which the decisions of both lower courts were based is abolished by the Nebraska Supreme Court, Nebraska's highest court. See *John Lee James, et al. v. John Milton Lieb, et al.*, 221 Neb. 47, — N.W.2d —, (October 25, 1985), in which the Court held:

> "Before concluding, *we must also address the further requirement of a cause of action for emotional distress in Fournell v. Usher Pest Control Co.*, 208 Neb. 684, 305 N.W.2d 605 (1981), *that plaintiff must evidence some concurrent physical injury resulting from the emotional trauma.* Other courts adopting the *Dillion* approach, to a certain degree, have retained this feature of the zone of danger rule. See, e.g., *Ramirez v. Armstrong*, supra; *Barnhill v. Davis*, 300 N.W.2d 104 (Iowa 1981); *Corso v. Merrill*, 119 N.H. 647, 406 A.2d 300 (1979). *We now reject this require-*

> *ment* for many of the reasons stated in the Chief Justice's dissent on *Fournell,* supra at 697, 305 N.W.2d at 611: To . . . require that, before one who is mentally injured may recover, he must at least regurgitate once seems . . . to be imposing upon the law a requirement that makes little or no sense.'" Id. at p. 58. (Emphasis added.)

It must be pointed out that the Nebraska decision was rendered after the circuit court's order denying Petitioners' Motion for Rehearing (August 14, 1985). Nevertheless, and though Petitioners remain convinced that the Trial Court usurped the function of the jury in substituting its own finding of fact for a verdict based upon "substantial evidence," Petitioners respectfully submit that all such questions are now moot and that Petitioners must be restored to their jury verdict.

It was long been the rule of this Court that:

> ". . . a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones." *Huddleston, et al. v. Dwyer, et al.,* 322 U.S. 232, 236, 64 S.Ct. 1015, 1018, 88 L.Ed. 1246 (1944).

This rule resulted from the incorporation in the landmark case of *Erie R.Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, of the doctrine espoused by Chief Justice Marshall in the case of *United States v. The Schooner Peggy,* 5 U.S. 103, 1 Cranch 103, 2 L.Ed. 49 (1801), as indicated in *Vanderbark v. Owens-Illinois Glass Co.,* 311 U.S. 538, 61 S.Ct. 347, 85 L.Ed. 327 (1941). The Court in *Vanderbark,* supra, also stated, at 542, that:

> "the dominant principle is that nisi prius and appellant tribunals alike should conform their orders to

> the state law as of the time of the entry. Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered."

The circumstances of this case before this Court warrant the application of the above principle to resolve the irreconcilable differences and call for the exercise of this Court's supervisory powers to correct the record as it presently stands.

Review Of This Court Is Necessary To Bring About Compliance Between The Existing Determination By The Eighth Circuit Court Of Appeals Of Nebraska Substantive State Law And The Intent Of The Rules Of Decision Act (28 U.S.C. Sec. 1652) And To Provide For An Orderly Judicial Administration Of State Law In The Federal Courts.

28 U.S.C. Sec. 1652, the Rules of Decision Act, requires the courts of the United States to apply the laws of a state in civil actions of the type before this Court. Under the circumstances of the Nebraska Supreme Court clarifying and confirming the substantive state law in question, it is apparent that the application by the Court below of its interpretation of the same substantive state law, which is contrary to the existing interpretation by the Nebraska Supreme Court, results in a disapplication of state law contrary to the intent and purpose of 28 U.S.C. Sec. 1652. This Court has pointed out the importance of the orderly judicial administration of state laws in the federal courts, *Huddleston,* supra, at 237. Furthermore, as this Court has stated in *Vandenbark,* supra, at 543:

> ". . . we are of the view that, until such time as a case is no longer sub judice, the *duty rests upon federal courts* to apply state law under the Rules of Decision statute in accordance with the then controlling

> decision of the highest state court. Any other conclusion would but perpetuate the confusion and injustices arising from inconsistent federal and state interpretations of state law." (Emphasis added).

As a matter of judicial clarity, certainty, and conformity, this matter begs for appropriate review by this Court.

Review By This Court Is Necessary As This Court Can Provide The Only Available Remedy To Insure Equal Application Of Present And Existing State Law In The State Courts And In The Federal Courts In Nebraska.

This matter involves a case of exceptional circumstance which can only be appropriately resolved by this Court. It should further be noted that this case is a matter of considerable public importance, as is evidenced by the Nebraska Association of Trial Attorneys interest in becoming, and attempt to enter, as amicus curiae before the Eighth Circuit Court of Appeals. The Petitioners, recognizing the lack of clarity and obvious confusion with regard to the issue in question and that the Nebraska Supreme Court had not considered the issue for several years prior, sought to have the matter certified to the Supreme Court of Nebraska for a clear and definitive determination of the issues. That request was denied by the Court of Appeals (See Appendix D). While Petitioners recognize that a matter of certification is discretionary, it is apparent that had the Circuit Court of Appeals certified this matter to the Nebraska Supreme Court, the highest state court would have interpreted the law such that the Court of Appeals would have been duty bound to reverse the interpretation of the lower court, thereby avoiding the present conflict in the interpretation of state law. As the

Court of Appeals declined to do so, it would seem incumbent that this Court review and reverse accordingly, to protect judicial integrity, provide fairness in the administration of justice, and rectify the existing conflict.

This Court has on numerous occasions applied the doctrine set forth in *Schooner Peggy,* supra, and *Huddleston,* supra, in the exact or similar circumstances to this case and where the change in law occurred even after the matter was pending on certiorari. See *Dinsmore v. Southern Express Company,* 183 U.S. 115, 22 S.Ct. 45, 46 L.Ed. 111 (1901); *United States v. Alabama,* 362 U.S. 602, 80 S.Ct. 924, 4 L.Ed.2d 982 (1960); *Gulf Offshore Company v. Mobil Oil Corporation,* 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981); and *Mills v. Rogers,* 457 U.S. 291, 102 S.Ct. 2442, 73 L.Ed.2d 16 (1982).

CONCLUSION

This Court should grant certiorari if for no other reason than to correct the present irreconcilable conflict between state and federal interpretation of the same state substantive law. At present the line of cases in the federal court in Nebraska is in direct conflict with that of the highest state court in Nebraska. Moreover, for reasons heretofore mentioned this Court has consistently imposed a duty upon federal courts to apply to a diversity case the state substantive law as determined by the highest court of the state and to do so even if the state determination occurs after judgment is rendered by the federal court. As this Court has pointed out, such action is necessary as "any other conclusion would but perpetuate the confu-

sion and injustices arising from inconsistent federal and state interpretations of state law." *Vandenbark*, supra, at 543.

It seems most appropriate under the circumstances that this case be considered pursuant to Rule 23 (.1) of the Rules of the Supreme Court for summary reversal on the merits or, at least, for remand to the Eighth Circuit Court of Appeals for further proceedings in light of the holding of the Supreme Court of Nebraska in *James v. Lieb*, supra. Petitioners respectfully pray, therefore, that this Court grant the petition for certiorari to resolve the matters herein.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1314

Appeal from the United States District Court
for the District of Nebraska

John L. Wilson and Roberta L. Wilson,
Husband and Wife,

Appellants,

v.

Sears, Roebuck and Co., a New York Corporation,

Appellee.

Submitted: October 10, 1984
Filed: March 20, 1985

Before HEANEY, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

The firing of a shotgun into the crowd at a supper club where John and Roberta Wilson were dining gives rise to this diversity action. Although they were not struck by the blasts, the Wilsons saw one member of their party killed and another suffer serious injury. Alleging that this incident caused them to suffer post-traumatic stress disorder, they sued Sears, Roebuck and Co., claiming that it was negligent in selling the gun to the mental patient who fired it in the club. The district court[1] set aside the

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[1]The Honorable C. Arlen Beam, United States District Judge for the District of Nebraska.

verdicts awarding the Wilsons $85,000 and entered judgment notwithstanding the verdict because the Wilsons had not sustained physical injuries susceptible of objective determination. The Wilsons appeal, arguing that the court improperly interpreted Nebraska law. We affirm the judgment of the district court.

On November 26, 1977, John and Roberta Wilson accompanied some friends to the Club 89 restaurant in Omaha. As they waited for a show to begin, Ulysses Cribbs, who had been treated in the Veterans Administration Hospital and diagnosed as a paranoid schizophrenic, began randomly firing at the patrons with a shotgun. John Wilson felt a very hot sensation go by the right side of his face. Roberta Wilson felt something fly into the side of her face and her hand, causing a stinging sensation. John, a police officer, yelled at his wife to give him his gun that she was carrying in her purse. He attempted to fire at Cribbs, but his gun malfunctioned. A companion of the Wilsons', Dennis Lipari, was shot in the face and died later, and Mrs. Lipari was seriously wounded. John began crying and became hysterical. John and Roberta were taken to the hospital, where they were given injections to calm them and released.

Around a week after the incident, John Wilson went to St. Louis for police training. His training officers stated that after his return he became quiet, withdrawn, preoccupied, and "was a different person." Upon returning to Omaha, Wilson was very quiet, withdrawn, and no longer displayed affection. Friends described him as "nervous," "going into a shell," and becoming "completely changed."

Wilson found himself more afraid of guns, violence and dying. While on patrol he would become frightened, breaking into a cold sweat with palitations. He felt that he could no longer perform his duties and resigned his position as a deputy sheriff. He claims to have suffered from nightmares, frequent headaches, dizziness, depression, nervousness, weight loss, and poor appetite.

In September 1979, the Wilsons were evaluated for purposes of this litigation. John was examined by a psychiatrist and a clinical psychologist and was found to suffer from a disorder described as "post-traumatic stress disorder, chronic type." *See generally* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 236-39 (3d ed. 1980). This manual describes the disorder as "the development of characteristic symptoms following a psychologically traumatic event that is generally outside the range of usual human experience." *Id.* at 236. A psychiatrist testified that the condition was directly attributable to the shooting incident. Four years after the shooting, John was treated by an internist and another psychiatrist for severe anxiety, severe depression, chest pains, hypertension, and a hernia. A psychiatrist testified that as a result of the traumatic experience, John Wilson became impaired in his job performance, social performance, and overall ability to function. He is required to take medication to assist him in sleeping and to control dizzy spells, blood pressure, and nervousness. Roberta was diagnosed to have suffered from a mild case of acute post-traumatic stress disorder. She claimed to have lost the affection of her husband as a result of the incident.

The Wilsons filed suit against Sears alleging that it had negligently sold the shotgun to Cribbs. After ver-

dicts for the plaintiffs ($75,000 for John, $10,000 for Roberta), the court granted a motion for a judgment notwithstanding the verdict:

> Damages for negligent infliction of emotional distress are only recoverable when such distress results in physical injury manifested by objective symptomatology. *Fournell v. Usher Pest Control*, 208 Neb. 684, 305 N.W.2d 605 (1981); *Owens v. Childrens Memorial Hospital*, 347 F. Supp. 663 (D. Neb. 1972); *see also Restatement (Second) of Torts* § 436A [1965]. While the Court will concede that the plaintiffs suffered severe emotional disturbance while present at or as an immediate result of the Club 89 shooting, we find that their injuries are not of the type susceptible of objective determination.
>
> Plaintiffs were diagnosed as suffering from post-traumatic stress disorder. Plaintiffs assert that they suffer from a panoply of anxiety-related ailments, including generalized pain, an inability to concentrate, hyperalertness, diminished sensitivity and intermittent sleeplessness. The only particular ailment relating to a specific portion of the body was John Wilson's chest pains. These pains were first exhibited several years after the shooting. Although one of the physicians testifying at trial attributed these pains to "anxiety," there is simply no evidence that adequately links this episode with the post-traumatic stress disorder. In any event, the plaintiffs stated repeatedly that they did not consider the chest pain to be an important factor. They concede that a symptom (chest pain) arising out of another symptom (anxiety) arising out of a traumatic event (the Club 89 occurrences) is not a condition that supports a recovery.
>
> Plaintiffs contend that their relevant symptoms are those of a person suffering from post-traumatic stress disorder, as shown by an authoritative publication, the Diagnostic Statistical Manual (DSM) III.

> They further contend that observation of these anxiety related symptoms by physicians and others provides the objective symptomatology necessary for a recovery of damages. However, the fact that attending physicians and friends hear about and observe an emotional state of mind does not transform such complaints and observations into objective findings of physical injury. The Court finds that, of all the symptoms recited, only the chest pains are susceptible to objective verification. Accordingly, under the facts of this case, the traumatic stress disorder and its various manifestations are not compensable.

Wilson v. Sears, Roebuck & Co., No. CV-80-0-117, slip. op. at 2-4 (D. Neb. Feb. 6, 1984). On appeal, the Wilsons urge that Nebraska law and the evidence presented at trial support a reinstatement of the verdicts.

The district court order concluded that the Wilsons' injuries were not compensable as a matter of Nebraska law because there was no physical injury manifested by objective symptoms. This decision concerning local law in a diversity action is given great weight on appeal. *O'Brien v. Hagen*, 705 F.2d 1001, 1005 (8th Cir. 1983); *Bergstrom v. Sambo's Restaurant, Inc.*, 687 F.2d 1250, 1255 (8th Cir. 1982). In reviewing the order, we look first to *Fournell v. Usher Pest Control*, 208 Neb. 684, 305 N.W. 2d 605 (1981), as it is the latest decision from the Nebraska Supreme Court concerning damages for mental distress.

In *Fournell*, the defendant treated Mrs. Fournell's home for termites. Several months later, she discovered extensive termite damage to the house. One to two months subsequent, she visited a doctor because she cried constantly, was deeply depressed, and could not sleep. She was hospitalized for "reactive depression," and there was

evidence "that her mental and emotional disturbance was caused by the discovery of the termite infestation." 208 Neb. at 686, 305 N.W.2d at 606. The trial court found two elements necessary to recovery: proof that the plaintiff suffered physical injury from emotional traumma, and evidence that the defendant's negligence had placed her in fear of peril for her own safety. The court granted summary judgment for the defendant.

On appeal, the supreme court established two requirements for recovering damages caused by negligently inflicted emotional distress. The plaintiff must have been in the zone of danger created by the defendant's conduct and have suffered "some type of physical injury." 208 Neb. at 687, 305 N.W.2d at 607. The court quoted *Restatement (Second) of Torts* § 436 (1965), which precludes recovery for "emotional disturbance alone, without bodily harm or other compensable damage." It concluded: "[W]hen the termite damage was discovered by the plaintiffs no physical injury resulted to anyone, nor was Susan Fournell placed in fear of bodily harm to herself or anyone else. The plaintiffs' claim for damages here rests on mental and emotional disturbance and distress alone." *Id.* at 687-88, 305 N.W.2d at 607. Alternatively, the court held that as a matter of law the defendant's failure to discover the damage did not place the plaintiffs in a zone of danger. *Id.* at 688, 305 N.W.2d at 607.

The Wilsons urge that the *Fournell* court did not reach the "physical injury" issue and distinguish the case on the ground that Mrs. Fournell was never in physical peril, in contrast to the Wilsons' position in the range of shotgun blasts. The judges dissenting in *Fournell*, however, read the majority opinion to conclude as a matter

of law that "crying, shaking, withdrawing, experiencing depression, and attempting to commit suicide are not sufficiently physical in nature to constitute subsequent physical injury entitling one to recover if believed by a jury." 208 Neb. at 701, 305 N.W.2d at 613 (Krivosha, C.J., dissenting). Whether or not the majority's statements regarding the injury issue were an alternate holding or merely dicta, they provided a basis for the district court to conclude that the state's highest court requires physical injury and that emotional disturbance and distress alone are not sufficient to establish a right to recover. Our function in this diversity case is to determine whether the district court erred in its determination of a state law question. While we entertain the view that the dissenting opinion of *Fournell* is far more persuasive than the majority opinion, it is our duty, as well as the district court's, to follow the court's decision, which is that of a majority of its judges.

Viewing the evidence in a light most favorable to the Wilsons, *see Lackawanna Leather Co. v. Martin & Stewart, Ltd.*, 730 F.2d 1197, 1200 (8th Cir. 1984), the primary "physical injury" demonstrated is John Wilson's chest pains. Wilson's doctor testified that the pains were caused by a hernia and stated the cause of the hernia was unknown. Similarly, the doctor did not link John's hypertension to the shooting incident, for its cause was also unknown. Thus, the district court did not err in ruling that the Wilson's had failed to prove that they sustained physical injury as defined in *Fournell*.[2]

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[2]In *Netusil v. Novak*, 122 Neb. 749, 235 N.W. 335 (1931), the court noted that there is "liability for damages for physical

(Continued on following page)

B.

The Wilsons argue that they should recover because their proof established that the post-traumatic stress disorder is "susceptible of objective determination." Dr. Swanson and Dr. Sletten, psychiatrists, and Dr. Wood, a clinical psychologist, all described the pattern of symptoms of the Wilsons. Dr. Swanson testified that this post-traumatic stress disorder was susceptible of objective determination and his views were mirrored by the others. The district court rejected the Wilson's argument that their mental and emotional disorders provided the objective symptomatology necessary for recovery. It concluded that such evidence of an emotional state did not transform the complaints and observations "into objective findings of physical injury." The Wilsons argue, however, that this evidence made a submissible case under *Owens v. Childrens Memorial Hospital*, 347 F. Supp. 663 (D. Neb. 1972), *aff'd*, 480 F.2d 465 (8th Cir. 1973).

Owens was a diversity action brought by a couple alleging that negligent medical treatment by the defendants resulted in the death of their child, causing them permanent "physical and mental anguish, great emotional dis-

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(Continued from previous page)

injuries which are proximately caused by fright and terror produced by one who owes a legal duty to the one injured." *Id.* at ——, 235 N.W. at 337. The defendant's dog snarled at the plaintiff, but did not bite her. She fainted, and as a "result of the shock received from this attack," suffered from "nervous prostration." After a verdict for the plaintiff, the trial court entered judgment for the defendants because the dog had not bitten the plaintiff. The Supreme Court reversed. The *Novak* court did not squarely address whether "nervous prostration" was a physical injury, but simply assumed that it was. Thus, the case does not support the Wilsons' claims of physical injury.

turbance, shock, and injury to their nervous systems." 347 F. Supp. at 664. The court held that the plaintiffs could not recover under Nebraska law because they had not been in peril. *Id.* at 669. The physical injury issue was never decided. The court observed: "whether the plaintiffs have sustained a definite nervous disorder or pure isolated mental anguish has not yet been proved to this Court." *Id.* at 667. It resolved the impact issue after "assuming that plaintiffs [could] prove that a sufficient physical injury has resulted." *Id.*

In dicta, the *Owens* court observed that "even though Nebraska has abrogated the impact rule, there is still a requirement that some type of 'physical injury' result from the negligently inflicted emotional suffering." *Id.* at 666. Endeavoring to define "physical injury," the court surveyed the law in other jurisdictions:

> The term "physical" is not used in its ordinary sense for purposes of applying the "physical consequences" rule. Rather, the word is used to indicate that the condition or illness for which recovery is sought must be one *susceptible of objective determination.* Hence, a definite nervous disorder is a "physical injury" sufficient to support an action for damages for negligence.

Id. at 667 (emphasis added) (quoting *Petition of United States*, 418 F.2d 264, 269 (1st Cir. 1969) (citations omitted)).[3] No Nebraska law was cited in *Owens* to support Petition's discussion of physical injury.

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[3]*Petition* was an admiralty claim arising from a seaman's psychoneurosis due to immersion in frigid waters after his ship had capsized. The grounding of the vessel was held to be an impact sufficient to satisfy the test applied by jurisdictions following the impact rule. 418 F.2d at 268.

Fournell later cited *Owens* only as recognizing Nebraska law that "there was still a requirement that some type of physical injury result from the negligently inflicted suffering." 208 Neb. at 687, 305 N.W.2d at 607. *Fournell* did not refer to the language from *Owens* discussing the physical injury definition in *Petition*. Moreover, the dissent in *Fournell* also fails to mention *Owens* and its discussion of physical injury. The Wilsons' argument, both to the district court and before us, does not attempt to establish that the evidence proved physical injury, but simply that the evidence of mental and emotional distress was sufficiently objective to recover under *Owens*. As we read *Owens* and *Fournell*, we cannot conclude that the district court erred in requiring proof of physical injury and finding that the evidence had not established such injury.

The district court's instruction,[4] based upon *Owens* reference to *Petition*, may well be contrary to the decision granting judgment notwithstanding the verdict. Nevertheless, we are satisfied that the *Petition* language from *Owens* does not have support in Nebraska law. If there was no submissible issue for jury consideration, a prior inconsistent jury instruction does not prevent the court from correctly ruling the submissibility issue after the verdict. *See Coca Cola Bottling Co. v. Hubbard*, 203 F.2d 859, 862 (8th Cir. 1953) ("[I]n determining whether a trial court has erred in denying a motion for a directed verdict made

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[4][T]o be entitled to damages resulting from an emotional disturbance, the plaintiffs must prove by a preponderance of the evidence that they suffered from some type of physical injury resulting from such emotional disturbance and that said physical injury was a proximate result of defendant's negligence. A physical injury is a condition of illness which is susceptible of objective determination.

at the close of the evidence, it is the applicable law which is controlling, and not what the trial court announced the law to be in his instructions."), *quoted in Hanson v. Ford Motor Co.*, 278 F.2d 586, 593 (8th Cir. 1960) (Blackmun, J.). The district court did not err in concluding that *Fournell* disallows recovery for mental and emotional disturbances and stress alone and that this was the extent of injuries that the Wilsons had proven. The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN L. WILSON and ROBERTA L. WILSON,

Plaintiffs,

vs.

SEARS, ROEBUCK & COMPANY,

Defendant.

MEMORANDUM AND ORDER

(Filed February 7, 1984)

This matter is before the Court upon defendant's motion for judgment notwithstanding the verdict under *Fed. R. Civ. P.* 50(b) (filing 99). Defendant Sears made a motion for a directed verdict at the close of all the evidence. Such motion was not granted. After the return of verdict and judgment thereon, the defendant submitted filing 99.

Since the jury verdict was in favor of the plaintiffs, the facts will be stated in the light of the evidence and the reasonable inferences derived therefrom most favorable to them. *Garoogian v. Medlock*, 592 F.2d 997 (8th Cir. 1979); *Zoll v. Eastern Allamakee Community School District*, 588 F.2d 246 (8th Cir. 1978).

On the evening of November 26, 1977, Ulysses Cribbs, Jr. entered the Club 89 Restaurant and Lounge located in Omaha, Nebraska, and opened fire on the crowd with a 12-gauge pump shotgun he had purchased from Sears, Roebuck & Company some five weeks earlier. The plaintiffs were present but were not bruised, cut, scraped, or otherwise abraded by the hail of shotgun fire. They did, how-

ever, hear disconcerting sounds and view frightening events including the death of a close friend. Plaintiff John Wilson, an off-duty deputy sheriff, attempted to shoot Cribbs with his service pistol but was unable to do so.

Plaintiffs then brought suit against Sears alleging that Sears acted negligently in selling the gun to Cribbs. The plaintiffs contended that Sears knew or should have known that Cribbs was dangerous with or likely to misuse a firearm. They offered evidence of violation of the terms of a form promulgated pursuant to regulations of the Bureau of Alcohol, Tobacco and Firearms developed under authority of the Gun Control and Safety Act of 1968. 18 U.S.C. § 1926.

Trial commenced in this matter on November 16, 1983, and the jury returned a verdict in favor of the plaintiffs in the amount of $75,000.00 for John Wilson and $10,000.00 for his wife, Roberta. For the reasons set forth below, the Court deems it proper to set aside the jury's verdict.

The Court concludes that even if Sears was negligent, plaintiffs have not suffered damages that are compensable under Nebraska law. Damages for negligent infliction of emotional distress are only recoverable when such distress results in physical injury manifested by objective symptomatology. *Fournell v. Usher Pest Control,* 208 Neb. 684, 305 N.W.2d 605 (1981); *Owens v. Childrens Memorial Hospital,* 347 F. Supp. 663 (D. Neb. 1972); *see also Restatement (Second) of Torts* § 436A. While the Court will concede that the plaintiffs suffered severe emotional disturbance while present at or as an immediate result of the Club 89 shooting, we find that their injuries are not of the type susceptible of objective determination.

Plaintiffs were diagnosed as suffering from post-traumatic stress disorder. Plaintiffs assert that they suffer from a panoply of anxiety-related ailments, including generalized pain, an inability to concentrate, hyperalterness, diminished sensitivity and intermittent sleeplessness. The only particular ailment relating to a specific portion of the body was John Wilson's chest pains. These pains were first exhibited several years after the shooting. Although one of the physicians testifying at trial attributed these pains to "anxiety," there is simply no evidence that adequately links this episode with the post-traumatic stress disorder. In any event, the plaintiffs stated repeatedly that they did not consider the chest pain to be an important factor. They concede that a symptom (chest pain) arising out of another symptom (anxiety) arising out of a traumatic event (the Club 89 occurrences) is not a condition that supports a recovery.

Plaintiffs contend that their relevant symptoms are those of a person suffering from post-traumatic stress disorder, as shown by an authoritative publication, the Diagnostic Statistical Manual (DSM) III. They further contend that observation of these anxiety related symptoms by physicians and others provides the objective symptomatology necessary for a recovery of damages. However, the fact that attending physicians and friends hear about and observe an emotional state of mind does not transform such complaints and observations into objective findings of physical injury. The Court finds that, of all the symptoms recited, only the chest pains are susceptible to objective verification. Accordingly, under the facts of

this case, the traumatic stress disorder and its various manifestations are not compensable.[1]

IT IS HEREBY ORDERED that defendant's motion for judgment notwithstanding the verdict is granted.

IT IS FURTHER ORDERED that the parties' motions to retax costs are hereby rendered moot, and each party shall bear its own costs.

DATED this 6th day of February, 1984.

BY THE COURT:

/s/ C. Arlen Beam
United States District Judge

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[1]To categorize damages resulting from emotional trauma into distinct categories of "physical" and "mental" pain is not to trivilize the latter, but to protect the Court and defendants from exposure to potentially fraudulent claims. *See generally* Prosser, Law of Torts § 54 (4th Ed. 1971).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

September Term, 1984

No. 84-1314NE

John L. Wilson, et al,

Appellants,

vs.

Sears, Roebuck & Co., etc.,

Appellee.

Appeal from the United States District Court
for the District of Nebraska

CV. 80-0-117

(Filed August 26, 1985)

This appeal from the United States District Court was submitted on the record of the said District Court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby affirmed in accordance with the opinion of this Court.

March 20, 1985

Costs of appellee for briefs for recovery from appellants: $850.67

A true copy.

ATTEST: /s/ Robert D. St. Vrain

Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

8/23/85

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1314

John L. Wilson, et al.,
Appellants,

v.

Sears, Roebuck & Co.,
a New York corporation,
Appellee.

Appeal from the United States District Court
for the District of Nebraska.

Filed: August 14, 1985

Before HEANEY, Circuit Judge, HENLEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

ORDER

The petition for rehearing and the motion to certify the issue or issues presented in this appeal to the Nebraska Supreme court are denied. The motion for leave to file brief amicus curiae filed by the Nebraska Association of Trial Attorneys is denied.

APPENDIX E

James v. Lieb, 221 Neb. 47, — N.W.2d — (October 25, 1985)

(Due to the extensive length and non-relevant portions of the entire case, only the relevant portions pertaining to the issues which appear in the Court below are appended. The below pages are 58-60.)

Before concluding, we must also address the further requirement of a cause of action for emotional distress in *Fournell v. Usher Pest Control Co.*, 208 Neb. 684, 305 N.W.2d 605 (1981), that plaintiff from the emotional concurrent physical injury resulting from the emotional trauma. Other courts adopting the *Dillon* approach, to a certain degree, have retained this feature of the "zone of danger" rule. See, e.g., *Ramirez v. Armstrong, supra; Barnhill v. Davis*, 300 N.W.2d 104(Iowa 1981); *Corso v. Merrill*, 119 N.H. 647, 406 A.2d 300 (1979). We now reject this requirement for many of the reasons stated in the Chief Justice's dissent in *Fournell, supra* at 697, 305 N.W. 2d at 611: "To . . . require that, before one who is mentally injured may recover, he must at least regurgitate once seems . . . to be imposing upon the law a requirement that makes little or no sense."

Ostensibly, the problem in this area is of proving to a jury that a reasonable person in the position of the bystander plaintiff has suffered a compensable injury. While physical manifestation of the psychological injury may be highly persuasive, such proof is not necessary given the current state of medical science and advances in psychology. There are primarily three problems with this requirement: (1) It is overinclusive, since it could possibly lead to recovery for trivial claims of mental distress accompanied by physical symptoms; (2) It is underinclusive, since serious distress is arbitrarily deemed not compen-

sable if not accompanied by physical symptoms; and (3) It encourages extravagant pleadings and distorted testimony. See, *Molien v. Kaiser Foundation Hospitals*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980); *Culbert v. Sampson's Supermarkets Inc.*, 444 A.2d 433 (Me. 1982); *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672 (1979); *Paugh v. Hanks*, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983).

In reaching our decision we are not unmindful of the several policy arguments advanced against the cause of action we have adopted. Typically, opponents of expanding liability in this area contend that (1) bystander recovery will inundate the courts with fictitious injuries and fraudulent claims; (2) courts will be deluged with a flood of litigation; (3) bystander recovery will unduly burden defendants with undue liability; and (4) once recognized, liability cannot reasonably be restrained. Each of these arguments have been adequately reflected by other courts. See, *Sinn v. Burd, supra; Culbert v. Sampson's Supermarkets Inc., supra.* We add the following comments.

First, even courts opposed to recognizing this cause of action have acknowledged that the fear of fraudulent claims alone is an insufficient reason to deny all such claims. See *Tobin v. Grossman*, 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969). Furthermore, the "zone of danger" rule also carries with it the risk of fraudulent claims. "It is not hard to imagine plaintiffs and their attorneys falsely alleging that the claimant was in some small way injured by the defendant's negligence, or was within the zone of danger in order to present a valid cause of action." Liebson, *Recovery of Damages for Emotional Distress Caused by Physical Injury to Another*, 15 J. Fam. L. 163, 174 (1977). Also, it is not unlikely that under a

"zone of danger" rule plaintiffs would carefully draft pleadings so as to vaguely present a factual question that the plaintiff was also in peril. Liebson, *supra*.

Second, taking California as an example, experience shows that its courts have not been overwhelmed with litigation in this area. See *Ramirez v. Armstrong*, 100 N.M. 538, 673 P.2d 822 (1983).

Third, the "dollars and cents" argument that society cannot afford the costs that will ensue from recognizing liability for the demonstrable injury of emotional distress naturally resulting from defendant's negligent act has been aptly dispelled. See *D'Ambra v. United States*, 114 R.I. 643, 338 A.2d 524 (1975). The possibility of increased insurance costs alone should not deny recovery for an otherwise valid claim.

Finally, we are not delayed by the specter that recognizing a cause of action for bystander recovery will naturally entail liability to every acquaintance of the victim. As we have emphasized, the class of bystanders limited to those with a marital or intimate familial status will sufficiently circumscribe the defendant's liability.

In summary, we hold that a plaintiff bystander has a cause of action for negligently inflicted foreseeable emotional distress upon a showing of marital or intimate familial relationship with a victim who was seriously injured or killed as a result of the proven negligence of a defendant. We thus find error in the district court's order sustaining the defendants' demurrer.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.